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REMARKS

Claims 1-11 and 28-34 remain pending in the instant application. Claims 12-27 and 35 are cancelled. Claims 1-8, 11 and 28-34 stand rejected; claims 9 and 10 are objected to. Claims 1, 9, 10 and 28 are amended without new matter. We believe that the above amendments and the remarks laid out herein below address and overcome each of the Examiner's rejections and objections. Numbered headings used below reflect the numbering of issues employed in the non-final Office Action mailed 24 October 2005.

Finality Withdrawn

We thank the Examiner for indicating that the finality of the previous Office Action has been withdrawn.

2-3. Rejection Maintained/Response to Arguments

The Examiner states that claims 1-3, 5 and 12 are rejected under 35 U.S.C. § 102(b) as being anticipated by Wilson, for reasons of record in the Office Action mailed on March 14, 2005. The Examiner states that Applicant's arguments of October 7 have been carefully considered; however, the Examiner continues to insist upon the following points:

- (a) That Wilson's tape is attached to a floor which includes pavement (as broadly interpreted); and
- (b) That Wilson teaches a flexible tape.

Respectfully, Applicant continues to strongly disagree with both of points (a) and (b), for at least the reasons detailed below.

Regarding Point (a)

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." MPEP § 2131, quoting *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). Wilson does not teach pavement, pavement tape or even concrete subflooring, yet the Examiner states that Wilson's seam sealer protector is "attached to a vinyl floor covering and

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the floor covering is located on the floor (which is interpreted to include pavement)." Office Action p. 2, item 3.

Because pavement is not recited or shown in Wilson, we believe the Examiner is essentially making an argument that pavement (and therefore pavement tape) is inherent in Wilson. However, regarding inherency, MPEP § 2112 states:

"In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art. *Ex parte Levy*, 17 USPQ2D 1461, 1464 (Bd. Pat. App. & Inter. 1990)."

The Examiner has not provided any factual or technical reasoning to support inherently present pavement beneath Wilson's vinyl floor covering. Per MPEP § 2112, the Examiner must present such factual or technical reasoning or withdraw the rejection.

We remind the Examiner that "To establish inherency, the extrinsic evidence 'must make clear that the missing descriptive matter is *necessarily* present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. *The mere fact that a certain thing may result from a given set of circumstances is not sufficient.*" MPEP § 2112(IV), quoting *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999).

We contend that such extrinsic evidence cannot be found, particularly because (1) pavement is commonly recognized as a surface that supports pedestrian or motor traffic, such as a sidewalk, crosswalk, parking lot or roadway. Pavement is not the same thing as a concrete subflooring (which the Examiner appears to assume in Wilson); (2) Wilson does not mention, describe or depict pavement or concrete, and (3) vinyl floor covering is often installed over a non-concrete substrate such as wood, for example when vinyl is utilized in second- or third-floor rooms. For at least these reasons, we believe that it cannot be shown that pavement is *necessarily* present in Wilson.

Furthermore, the Examiner ignores the structure shown and described in Wilson. Wilson's seam sealer protector is for use "immediately following a resilient vinyl floor covering

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installation." Wilson col. 4, lines 29-30. Accordingly, it is explicitly described as being "attached to the installed floor covering." Wilson col. 6, line 44. Wilson's seam protector would therefore be applied to vinyl. We respectfully direct the Examiner's attention to Wilson FIG. 4. This figure, among others, clearly shows the seam-sealer cover affixed to floor covering 22 and positioned with the apex of its tent-like structure over floor covering seam 21 and sealer 23. Any subflooring would be positioned beneath the floor covering, sealer and seam. Thus, Wilson's tent-like structure does not affix to the subflooring (no matter what type of subflooring is used).

On the other hand, Applicants' amended claims are clearly directed towards a pavement tape for conveying commercial information when affixed to pavement. As supported by the specification, "This application relates to the field of dissemination of information on roads, parking lots, and walkways," Description p. 1, lines 4-5, and describes the use of a pavement tape on "a standard pedestrian crosswalk," and "a parking lot." Description, p. 4, lines 5 and 8. The use of pavement tape on a road is also described. See Description p. 7, lines 9-30. This is clearly different from Wilson's seam sealer protector, which is meant for, described and depicted as affixing to a vinyl floor covering.

We have shown that (1) that Wilson does not mention pavement or even concrete for use as subflooring material, (2) the Examiner must present extrinsic evidence showing that pavement is necessarily present in Wilson (and we contend that such evidence cannot be found), and (3) Wilson's seam sealer protector affixes to a vinyl floor covering and not to any subflooring. Wilson's device is not a pavement tape.

We believe that claim 1 is allowable over Wilson for at least the above reasons. However, in hopes of advancing the instant application to allowance, claim 1 is amended to recite a "pavement tape comprising a continuous elongated flexible tape body... configured for affixing to pavement." Wilson's tape is clearly meant and designed for affixing to vinyl. It does not include a tape body configured for affixing to pavement.

Because Wilson's tape is neither a pavement tape nor configured for affixing to pavement, it is different from "a pavement tape for conveying information when affixed to pavement." See claim 1.

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Regarding Point (b)

In addition, we continue to submit that Wilson does not teach a flexible tape body, as is required by independent claim 1. The Examiner states:

"as acknowledged by the applicant, the phrase "cardboard is not capable of being bent repeatedly without injury or damage" teaches that the cardboard can be flexed and hence it is taken to be flexible."

Respectfully, the Examiner's statement does not make technical sense. As supported in our prior response, we reiterate that a flexible material is one that can be bent repeatedly without injury or damage. By noting that cardboard cannot be bent repeatedly without being injured or damaged, Applicant points out that cardboard is not flexible. Again, if one were to freely twist or bend Wilson's seam sealer protector, it would be damaged.

Because Wilson does not teach a flexible tape body, we maintain that Wilson cannot teach a flexible tape body with a front face comprising at least one symbol that conveys information, as is also required by independent claim 1. Instead, Wilson teaches printed matter on a sub-center panel of a cardboard blank. See Wilson col. 5, lines 45-49; col. 8, lines 63-65; see also FIGs. 1, 3 and 4. Wilson's sub-center panels are not the same thing as Applicant's tape body. For example, there is absolutely no indication that Wilson's sub-center panels are backed with, incorporated with or otherwise inclusive of tape. The only tape mentioned in Wilson is attached to tabs 2 and 4. Wilson col. 6, lines 19-20; see also FIGs. 1-4. Neither this tape nor the tabs are said, shown or suggested to include any printing.

On the other hand, in at least one embodiment, Applicant's tape body is clearly described as having a printed symbol on its surface and an adhesive on its bottom. For example, as supported by the description: "This tape comprises a tape body 101 and a series of symbols 102 arrayed on the surface of the tape body," p. 5, ¶[0043], and "a layer of pavement tape adhesive 112 on the bottom of tape body 101" p. 10, ¶[0066]. Applicant's tape body is therefore (again) patentably different from Wilson's seam sealer cover.

For at least the above reasons, we submit that Wilson does not anticipate independent claim 1. However, claim 1 is additionally amended to recite a continuously flat rear face of a tape body. This amendment is supported at least by FIGs. 2, 5 and 6, which show a continuously

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flat rear face. Per MPEP § 2163.06, "...information contained in any one of the specification, claims or drawings of the application as filed may be added to any other part of the application without introducing new matter." The amendment to claim 1 constitutes the addition of information at least from the drawings (e.g., FIGs. 2, 5 and 6) into the claims, and is therefore acceptable and in compliance with 35 U.S.C. § 112, first paragraph. No new matter is added.

Wilson does not teach a continuously flat rear face. Wilson's device is repeatedly described as "tent-like" and depicted as a tent with a central cavity positioned over a line of seam sealer. Wilson col. 4, line 49; FIGs. 4-7. On the other hand, Applicant's pavement tape may be embodied as a continuously flat-bottomed tape, without a central cavity (see for example FIGs. 2, 5 and 6).

Wilson teaches against a continuously flat rear face by strongly teaching against anything touching vinyl flooring seam sealer. For example, Wilson faults prior art seam protectors because "a gust of wind or accidental bump may shift the tent and cause the seam sealer to smear as well as become contaminated" (col. 3, lines 6-8). As Wilson recites, seam sealer is "sticky until fully cured: a process that requires from one to eight hours" (col. 2, lines 8-9). If Wilson's device had a continuously flat rear face, the flat rear face could touch the seam sealer, stick to it, contaminate it and therefore defeat Wilson's intended purpose of providing a seam sealer protector.

Per MPEP § 2131, "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). In order to anticipate a claim, Wilson must teach every element of the claim and "the identical invention must be shown in as complete detail as contained in the ... claim." MPEP § 2131 citing *Verdegaal Bros. V. Union Oil Co. of California*, 814 F.2d 628, 2 USPQ2d 1051 (Fed. Cir. 1987) and *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 9 USPQ2d 1913 (Fed. Cir. 1989), emphasis added. As shown, Wilson does not teach a pavement tape, a tape for affixing to pavement, a flexible tape body or a tape having a continuously flat rear face. Further, pavement is not present in Wilson, and is not inherent. Wilson thus can not and does not anticipate claim 1. Claims 2, 3 and 5 depend from claim 1 and therefore benefit from like argument.

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4-5. Rejections Withdrawn

The Examiner indicates that the rejections of (a) claims 1-5, 7-8, 11, 28-32 and 34, and (b) claims 6 and 33 that were based upon Bastiaens have been withdrawn. However, the Examiner then proceeds to use Bastiaens again, to reject these exact claims. Pursuant a telephone conversation with Examiner Ahmad on 25 October, we believe that the aforementioned claims currently stand rejected (although we disagree with the current rejections, as noted herein below).

6. Response to Arguments

The Examiner indicates that Applicant's arguments with respect to claims 1-11 and 28-34 have been considered but are moot in view of the new ground(s) of rejection. We respectfully disagree, for at least the reasons presented in sections 7-11, below.

7-8. Claim Rejections – 35 U.S.C. § 102

Claims 1-5, 7-8, 11, 28-32 and 34 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Bastiaens. Respectfully, we must disagree. The Examiner continues to insist that Bastiaens teaches a tape with a front face comprising at least one symbol. See, e.g., the pending Office Action, p. 6, item number 11. Regardless, Bastiaens fails to show the identical invention as contained in amended claims 1-5, 7-8, 11, 28-32 and 34, and therefore cannot and does not anticipate said claims.

Before addressing the specific patentable elements of the aforementioned claims, we note that there appears to be some fundamental confusion as to the invention and process of the Bastiaens patent, which we attempt to clarify herein below.

The Examiner appears to mistakenly identify Bastiaens' image transfer sheet (7) as a releasable cover layer to the Bastiaens' retroreflective article. Respectfully, it is nothing of the sort. As is well known in the art of image transfer, a transfer sheet holds an image which is then transferred to a separate substrate. It is typically utilized only for the purpose of transferring the image, after which it is thrown away or recycled. Accordingly, Bastiaens nowhere describes it as

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a tape, and Bastiaens specifically teaches that the transfer sheet (7) is used in making the retroreflective article. The transfer sheet is not a part of the finished product:

"The printer 100 uses electrostatic means to form and develop a latent electrostatic image on an image transfer sheet 7 which may be a single sheet or a continuous web. The image transfer sheet 7 comprises a paper support base 3 having first a conductive layer 2 and then a dielectric layer 4. A release coating 6 may be applied to the dielectric layer 4 to facilitate transfer of an image. The surface of the image transfer sheet 7 having the release coating 6 proceeds in a direction 8 first passing a stylus writing head 10 which deposits a charge 12 having varying charge density to define a latent electrostatic image. After passing the writing head 10, the image transfer sheet 7 passes a toning station comprising a toner applicator 16 in contact with a liquid toner bath 18 in a container 20. The liquid toner comprises toner particles dispersed in an insulating liquid and are collectively referred to as the liquid toner bath 18. Liquid toner 22 is transported by the applicator 16 to the image transfer sheet 7 and deposited to form a toned image 24 conforming to the latent electrostatic image 12." Bastiaens col. 2, lines 38-57; FIG. 1. Furthermore, "The image transfer sheet web 28 and the receptor sheet web 38 pass through the nip 40 of rollers 42, 44 where heat and pressure are applied to transfer the toned image 24 from the image transfer sheet web 28 to the surface 33 of binder layer 30 of the receptor sheet web 38. The continuous webs 28, 38 are collected by pickup rolls 36, 34. *The imaged receptor sheet provides a base construction suitable for making retroreflective articles.*" Bastiaens col. 3, lines 15-22, emphasis added.

Bastiaens' FIG. 3 illustrates the image transfer sheet web being collected on a pickup roll after transfer of the toned image. As is clearly shown and described, the imaged receptor sheet web 34 is collected on a different pickup roll. The transfer sheet is plainly not a part of the base construction that is used to make Bastiaens' retroreflective articles.

In image transfer of the type practiced in Bastiaens, the transfer sheet does not include any adhesive (in other words, it is not a tape). Indeed, Bastiaens recites "the image transfer sheet 7 comprises a *paper* support base 3." Bastiaens col. 2, line 42-43. There is no mention of a tape or any adhesive involved with transfer sheet 7. Accordingly, Bastiaens lists Trident Transfer Paper ES as a suitable transfer sheet. We attach a 3M Product Bulletin describing Trident Transfer Paper, for the Examiner's review. There is no mention of any adhesive property anywhere within the Trident Bulletin. Indeed, common sense teaches against using a tape or even an adhesive paper as the transfer sheet in Bastiaens. For example, if Bastiaens were to use

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a sticky transfer paper or a tape, it would stick to itself when wound on roll 20, making it difficult to cleanly pass the transfer sheet web through Bastiaens' image transfer station 300. See FIG. 3.

As explained above, Bastiaens' transfer sheet 7 is not a tape. Furthermore, transfer sheet 7 is not a part of Bastiaens' final product. Rather, it is used to make Bastiaens' base construction, which is then used to make retroreflective articles. Because the image transfer sheet 7 is not a part of Bastiaens' base construction for making retroreflective articles, the following discussion centers around the final retroreflective article.

Independent Claims 1 and 28: Independent claims 1 and 28, as amended, require a pavement tape having a continuous elongated flexible tape body of homogeneous composition, including a front face with a symbol printed thereon. These amendments are fully supported by the specification and drawings, and therefore in compliance with 35 U.S.C. § 112, as "...information contained in any one of the specification, claims or drawings of the application as filed may be added to any other part of the application without introducing new matter." MPEP § 2163.06.

For example, the instant application recites: "Tape body 101 is made from plastic based on an acrylic resin, but it may be made from many other forms and types of material. For example, tape body 101 may be made from sheet or bar stock", Specification p. 5, ¶ [0044]. Furthermore, "Symbols 102 may be differentiated from tape body 101 in many ways. They may be painted or printed onto tape body 101 in a color or colors contrasting with the color or colors of tape body 101." Specification, p. 7, ¶ [0052]. The drawings, e.g., FIGs. 5-13, also support either a homogeneous front face or a homogeneous top surface of a front face (in FIG. 5, as amended 5/25/2005, note that front face 10 is covered by a layer of adhesive 107, which is then covered by glass beads 106).

Bastiaens' retroreflective article does not include a homogeneous tape body. Rather, Bastiaens clearly describes and depicts "the surface of the base material comprises a binder layer of polyvinyl butyral resin *having glass microspheres enclosed therein and a specular reflective layer underlying and spaced apart from the microspheres by the resin.*" Bastiaens col. 1, lines

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51-55; FIGs. 2 and 4. A surface that includes three separate elements mixed together (e.g., resin, enclosed microspheres and specular reflective layer) is not homogeneous. If Bastiaens' surface is not homogeneous, then neither is her receptor sheet 18, which the Examiner likens to Applicant's tape body. See page 5 of the pending Office Action, first paragraph. Note in particular that microspheres 32, binder layer 30 and specular layer 34 are shown disposed within receptor sheet 18. See Bastiaens' FIGs. 2, 4. We believe that claims 1 and 28 are patentable over Bastiaens at least because Bastiaens does not teach, depict or suggest a homogeneous tape body. However, Bastiaens also fails to teach or suggest a symbol that is printed upon a front face, as is also required in claims 1 and 28.

Bastiaens teaches printing an image on a transfer sheet, and then transferring that image onto receptor sheet 18, which the Examiner identifies as a tape body (see page 5 of the pending Office Action, first paragraph). For example, Bastiaens recites:

"FIG. 2 illustrates in cross section an image transfer sheet 7 having a toned electrostatic image 24 in juxtaposition to a receptor sheet 18 comprising base material *in preparation for transferring the image 24 to the surface 33 of the receptor sheet 18.*" Bastiaens, col. 2, lines 62-67, emphasis added.

Further indication that Bastiaens' image is transferred to, and not printed upon his base material is for example provided by Bastiaens' description of "electrographically printing an image *on an image transfer sheet* and contacting the image on the image transfer sheet to a base material under pressure and at an elevated temperature so that the image is *transferred to a surface of the base material*", Bastiaens col. 1, lines 47-51, emphasis added.

As shown, Bastiaens fails to teach or suggest at least two elements of claims 1 and 28. We therefore respectfully request the Examiner's withdrawal of the rejection, and allowance of claims 1 and 28.

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Dependent Claims 2-5, 7-8, 29-32 and 34: Claims 2-5, 7-8 and 11 depend from claim 1. Claims 29-32 and 34 depend from claim 28. The aforementioned dependent claims thus benefit the arguments presented in support of claims 1 and 28. However, there are additional reasons for the patentability of claims 2-5, 7-8, 11, 13-14, 16-17, 19, 29-32 and 34, including the following:

Claims 2, 3 and 29, 30: Bastiaens does not teach the limitations of these claims, in the context of respective base claims 1 and 28.

Claims 4 and 31: Regarding Applicant's prior arguments, the Examiner states "Contrary to applicant's position about claims 4 and 31, the front sheet covering the tape front surface is a transfer tape that is releasably bonded to the pavement tape." Respectfully, as explained above, this is incorrect. Transfer sheet 7 is not a tape, and it is not bonded to Bastiaens' base construction. See general description of Bastiaens, at the beginning of sub-section 7-8, above. Furthermore, Bastiaens is completely silent as to any protective function of image transfer sheet (7). Therefore, Bastiaens does not teach a flexible protective tape that is releasably bonded to a top surface of a front face of a pavement tape.

Claims 5-8 and 32-34: Bastiaens does not teach the limitations of these claims, in the context of respective base claims 1 and 28. For example, Bastiaens does not teach a pavement tape of claim 1, with a front face comprising an at least partially reflective symbol, as in claim 7. Bastiaens recites a retroreflective article with an image on the surface of a retroreflective base material, wherein "the surface of the base material comprises a binder layer of polyvinyl butyral resin having glass microspheres enclosed therein and a specular reflective layer underlying and spaced apart from the microspheres by the resin." col. 1, lines 53-55; see also FIG. 2 and col. 2, line 63 - col. 3, line 4. An image is then transferred to this base material, in particular, "to the side of the base material closest to the microspheres and opposite the reflective layer." Bastiaens, col. 4, lines 34-35. This is different from an at least partially reflective symbol on a front face. Bastiaens' image itself is not described as reflective.

Claim 11: The Examiner continues to argue that the railing of claim 11 "is not found to be of positive limitation as it is attached to the intended use pavement and not part of the claimed

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tape." Office Action, page 5. We strongly disagree. Claim 11 specifies that the tape further comprises the railing, and that the railing is attachable to (and not attached to) pavement. Bastiaens is completely silent as to any railing. Therefore, claim 11 is not anticipated.

We have demonstrated that Bastiaens does not anticipate claims 1-5, 7-8, 28-32 and 34. Withdrawal of the Examiner's rejection under 35 U.S.C. § 102(e) is therefore respectfully requested.

9-10. Claim Rejections – 35 U.S.C. § 103

The Examiner continues to reject claims 6 and 33 as being unpatentable in view of Bastiaens. Specifically, the Examiner states that it would have been obvious to provide a tape having a width of 6-12 inches. Respectfully, as shown above, Bastiaens fails to teach or suggest a pavement tape with a front face having a top surface comprising a symbol. Bastiaens thus fails to teach or suggest all of the limitations of claims 1 and 28 and cannot render these claims *prima facie* obvious, per MPEP § 2142. Claim 6 depends from claim 1 and claim 33 depends from claim 28. A *prima facie* case of obviousness is therefore not established over these claims; we thus request withdrawal of the §103 rejection.

11. Response to Examiner's Comments on Prior Arguments

The Examiner states, "Regarding Bastiaens reference applicant argues that the front face does not comprise at least one symbol. This is not found to be convincing the image on the tape of Bastiaens is considered to be a symbol." Office Action p. 6, item 11. Respectfully, regardless of whether the Examiner deems Bastiaens' image a symbol, it is not printed on a homogeneous front face (or on a homogeneous top surface).

As for the Examiner's note that "the front sheet covering the tape front surface is a transfer tape that is releasably bonded to the pavement tape," we respectfully direct the Examiner to our prior explanation of the image transfer process.

With regard to the Examiner's note that the phrase attachable only requires the ability to so perform, we point out that regardless of this position, claim 11 recites that the pavement tape

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further comprises a railing. Bastiaens does not teach a pavement tape with a railing that is able to attach to pavement. Bastiaens does not mention or depict any railing, at all.

12. Allowable Subject Matter

We thank the Examiner for the indication of allowable subject matter in claims 9, 10. We concur that the prior art fails to teach (a) the presence of at least one symbol formed as a perforation, or (b) a flexible mask tape having at least one symbol formed as a perforation extending from its front face to its rear face, the tape bonded to the front face of the pavement tape.

Claim 10 is amended to incorporate the limitations of original claim 1, since it was deemed allowable prior to any amendments to the base claim. See, e.g., the Office Action mailed 3/14/2005.

Claim 9 is amended to incorporate the limitations that were present in claim 1 when claim 9 was first deemed allowable, except that in addition, the objected-to negative limitation "wherein the front and rear faces do not overlap an end" is replaced with "wherein the front and rear faces are exposed at an end". See the Office Action mailed 8/9/2005.

We believe that these amendments overcome the Examiner's objections, thus, we respectfully request allowance of claims 9 and 10.

13. Conclusion

The cited prior art does not teach or suggest each limitation of claims 1-11 and 28-34. The references thus fail under 35 U.S.C. §§ 102-103. We respectfully request withdrawal of each of the Examiner's rejections and objections, and we solicit a Notice of Allowance for all of claims 1-11 and 28-34.

It is believed that all of the pending claims have been addressed. However, the absence of a reply to a specific rejection, issue or comment does not signify agreement with or concession of that rejection, issue or comment. In addition, the claim amendments made herein do not signify concession of unpatentability of the claim prior to its amendment.

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We again specifically request to interview this case should any issues remain outstanding. The Examiner is therefore encouraged to telephone the undersigned attorney should this occur and prior to any further Office Action.

The Office Action Summary included with the Non-Final Action of 24 October 2005 sets a shortened statutory period for reply as "3 month(s) or thirty (30) days, whichever is longer, from the mailing date of this communication." Office Action Summary (second page of the Action of 10/24/05). This Response is submitted within 4 months of said mailing date, thus, we also submit herewith a Petition for one month's extension of time, along with authorization to charge the required fee to deposit account no. 12-0600.

No fees are believed due for newly-independent claims 9 and 10. Four independent claims (1, 9, 10 and 28) remain pending in the instant application. This matches the number of independent claims (12, 20, 22 and 23) originally paid for.

No other fees are believed due; however, if any fee is deemed necessary in connection with this Amendment and Response to Non-Final Office Action, the Commissioner is hereby authorized to the aforementioned deposit account.

Respectfully submitted,

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